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No. 97-313

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

MRS. IDA GUTHMANN, deceased, STEPHEN F. GUTHMANN, ESQ., personally and as administrator as of 24 September 1992,

Petitioners,

against

CROUSE IRVING MEMORIAL HOSPITAL, ESTER MURROCK-NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P.A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA, DR. GEORGE E. MITCHELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSTION

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STATEMENT OF THE CASE

The New York Court of Appeals dismissed petitioner's motion seeking leave to appeal to that court from an order of the New York State Supreme Court, Appellate Division, Fourth Department affirming a New York State Supreme Court order denying his motion to renew summary judgment motions made by the respondents that had been granted, culminating in the dismissal of petitioner's complaint in this action alleging medical malpractice and wrongful death. The Court of Appeals has also denied petitioner's motion seeking leave to appeal from the Appellate Division's affirmance of the dismissal of the complaint.

Ida Guthmann, an 81 year old woman, was brought to the Crouse Irving Memorial Hospital ("Crouse") emergency room on September 10, 1989 in an unconscious state, with a medical history that included progressive dementia, a prior

myocardial infarction, paroxysmal atrial fibrillation, high blood pressure, sarcoid osteoarthritis, and latent diabetes. She presented with subdural hematomas which necessitated an emergency craniotomy. She remained hospitalized at Crouse in a chronic vegetative state until her death almost two years later. During that time, she had a tracheostomy because of prolonged intubation and had a feeding tube placed in her stomach.

Petitioner raised several federal statutory claims for the first time in his appeal to the Appellate Division: the Emergency Medical Treatment and Active Labor Act, 42 USC §1395dd ("EMTA-LA"); the Rehabilitation Act of 1973 29 USC §794; and the Americans with Disabilities Act, 42 USC §12101. Under New York law, arguments must be raised in the lower court in order to be considered by the Appellate Division for review. Utica Board of Water Supply v. New York State Health Department, 96 AD2d 719 (4th Dept. 1983). Petitioner has therefore failed to preserve his federal claims

for appellate review and they should not now be considered.

The Appellate Division did not render a written opinion in affirming the dismissal of the petitioner's complaint and denial of his motion to renew. There is no basis for concluding that the court did not follow its own precedent in deciding the appeal, or that it even considered the petitioner's federal statutory arguments raised for the first time on the appeal.

THE PETITION SEEKING A WRIT OF CERTIORARI SHOULD BE DENIED

Petitioner relies upon 28 USC §1257 in his effort to invoke this court's jurisdiction. The statute provides that final judgments of the highest court in which a decision could be had may be reviewed only when:

> the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the

> United States, or where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

This court has no jurisdiction to review state court determinations of purely state law. International Longshoremen's Association, AFL-CIO v. Davis, 476 US 380, 387 (1986). This court also has no jurisdiction to review state court determinations that are supported by independent and adequate state law grounds. Id.

Under New York law, in order to defeat the respondents' summary judgment motions petitioner was required to produce proof in evidentiary form to support his claims of medical malpractice and wrongful death and negligence and abandonment, once the respondents had satisfied their burden of making a prima facie showing of entitlement to judgment as a matter of law. Fiore v. Galang, 64 NY2d 999 (1985). He failed to do so, and the court below properly granted the

respondents' motions by the application of New York State law.

With regard to the petitioner's motion to renew, the lower court properly exercised the discretion conferred by state law to deny the motion for failure to make a showing that new facts presented were unknown and not discoverable at the time of the original motion. Gifaldi v. Dumont Co., Inc. 172 AD2d 1025 (4th Dept. 1991).

While this court would not be bound by a state court determination that the federal statutory claims were raised properly by the petitioner in the state court proceedings, there is no basis in this case for concluding that they were, when the petitioner himself concedes that the claims were not asserted until his appeal to the Appellate Division. (Petition, p. 1). Furthermore, there is no reason to believe that federal law played any part whatsoever in the Court of Appeals decision to deny the motion for leave to appeal (the only

order with respect to which the writ is sought).

This case is not one in which a state court of last resort has decided an important federal question in a manner that conflicts with the decision of another state's court of last resort or a United States Court of Appeals. Nor is this a case in which the state court has decided an important question of federal law that has not been, but should be settled by this Court, or conflicts with any relevant decision of this Court. This is a straightforward case sounding in medical malpractice and wrongful death; one that should be adjudicated by the application of state law.

The Appellate Division correctly applied state law in affirming the dismissal of the petitioner's medical malpractice action and the denial of his motion to renew. Moreover, if the state court had considered the petitioner's untimely federal law claims, the court would have had to conclude that they had no merit.

The EMTALA applies only when a patient presenting to an emergency room does not receive proper medical screening or is not stabilized before being transferred or discharged. Matter of Baby K, 16 F3d 590 (4th Cir.), cert. denied 115 Sct 91 (1994). Mrs. Guthmann had been a patient at Crouse Irving Memorial Hospital for nearly two years at the time of alleged malpractice and abandonment, precluding application of the EMTALA statute.

The purpose of the Rehabilitation Act is to prohibit discrimination on the basis of handicap by programs receiving federal aid. Stephanidis v. Yale University, 652 F. Supp. 110 (D. Conn. 1986) aff'd, 814 F. 2d 654 (2d Cir. 1986). There was no evidence of discrimination against the plaintiff's decedent on the basis of a handicap before the state court. Nor was the state court presented with evidence that the defendant hospital received federal funds. The Rehabilitation Act was not properly raised in the court below and there is no basis for its application to the facts of this case.

Finally, the Americans with Disabilities Act expands the Rehabilitation Act to apply to acts of discrimination by entities that do not receive federal funding. McDonald v. Com. of Pa. Dept. Of Public Welfare, 62 F. 3d 92 (3d Cir 1995). The act applies to discrimination on the basis of employment disability, the provision of public services, and in the public accommodation. The ADA was not properly raised below, and there is no basis to support the application of this statute to the facts of this case.

CONCLUSION

For the foregoing reasons, an Order is respectfully requested that will deny Petitioner's application for a writ of certiorari.

DATED: September 15, 1997

Respectfully Submitted,

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